

125 FERC ¶ 61,332  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Suede G. Kelly, Marc Spitzer,  
and Jon Wellinghoff.

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER05-6-093 ER05-6-107
Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C	Docket Nos. EL04-135-096 EL04-135-111
Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C.	Docket Nos. EL02-111-113 EL02-111-128
Ameren Services Company	Docket Nos. EL03-212-109 EL03-212-124

ORDER APPROVING CONTESTED SETTLEMENT AGREEMENTS

(Issued December 19, 2008)

1. This order approves two separate contested settlement agreements that resolve among the respective parties all issues related to the Seams Elimination Cost/Charge Adjustment/Assignment (SECA) charges that had been set for hearing in the above-captioned dockets. The order finds that the two settlements are fair and reasonable and in the public interest.

**PJM Settlement**

2. On January 18, 2007, in Docket No. ER05-6-093, *et al.*, the PJM Settling Parties<sup>1</sup> and the Midwest ISO Settling Parties<sup>2</sup> (collectively PJM/Midwest ISO Settling Parties) filed a Settlement Agreement (PJM Settlement). Specifically, under Section 3.1 of this settlement, each PJM Settling Party that is a load serving entity accepts responsibility with respect to total monetary obligations to the Midwest ISO Settling Parties that are transmission owners in the amounts shown in Appendix A of this settlement for each such PJM Settling Party. Each Midwest ISO Settling Party that is a load serving entity accepts responsibility with respect to total monetary obligations to the PJM Settling Parties that are transmission owners in the amounts shown in Appendix A of this settlement for each such Midwest ISO Settling Party.

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<sup>1</sup> The PJM Settling Parties are Exelon Corporation on behalf of its subsidiaries Commonwealth Edison Company, Commonwealth Edison Company of Indiana, Inc., PECO Energy Company, Exelon Generation Company, LLC and Exelon Energy Company; Dominion Retail, Inc.; PPL Electric Utilities Corporation; PPL EnergyPlus, LLC; Pepco Holdings, Inc. on behalf of its affiliates Potomac Electric Power Company, Delmarva Power & Light Company, Atlantic City Electric Company, Pepco Energy Services, Inc., and Conectiv Energy Supply, Inc.; Public Service Electric and Gas Company; PSEG Energy Resources & Trade LLC; Rockland Electric Company; UGI Utilities, Inc.; Virginia Electric and Power Company; West Penn Power Company; Monongahela Power Company and the Potomac Edison Company; Indiana Municipal Power Agency; Wabash Valley Power Association, Inc.; and Boroughs of Lansdale, Blakely, Catawissa, Duncannon, Hatfield, Kutztown, Lehighton, Middletown, Mifflinburg, Olyphant, Quakertown, Royalton, St. Clair, Schuylkill Haven, Watsontown, and Weatherly, Pennsylvania.

<sup>2</sup> The Midwest ISO Settling Parties for purposes of this settlement are: Alliant Energy Corporate Services, Inc. on behalf of its operating company affiliates Interstate Power and Light Company and Wisconsin Power and Light Company; Ameren Services Company, as agent for Union Electric Company, Central Illinois Public Service Company, Central Illinois Light Company, and Illinois Power Company; American Transmission Company LLC; City Water, Light & Power (Springfield, IL); Duke Energy Shared Services, Inc., for the Cincinnati Gas & Electric Company, PSI Energy, Inc., and the Union, Light, Heat and Power Company; E.ON U.S. LLC, for Louisville Gas and Electric Company and Kentucky Utilities Company; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; Manitoba Hydro; Michigan Electric Transmission Company, LLC; Minnesota Power and its subsidiary Superior Water, L&P; Montana-Dakota Utilities Company; Northern Indiana Public Service Company; Northern States Power Company and Northern States Power Company (Wisconsin), subsidiaries of Xcel Energy Inc.; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Wabash Valley Power Association, Inc.; and Borough of Zelienople.

3. Under Section 6.4 of the PJM Settlement, the standard of review for any modifications to this settlement requested by a non-party will be the most stringent standard permissible under applicable law.

4. On February 2, 2007, Quest Energy, LLC, WPS Energy Services, Inc., and Strategic Energy, LLC (collectively, Quest Energy) filed a protest and comments opposing the PJM Settlement, stating that it is concerned that the PJM Settlement may affect non-settling parties. Quest Energy claims the PJM Settlement results in the transmission owners collecting 80 percent of their claimed lost revenues, which Quest Energy argues were shown at hearing in these proceedings to be excessive. It also contends that Sections 2.2 and 3.7 of the PJM Settlement attempt to directly affect any remedy that Quest Energy will obtain as a result of a Commission order on the pending Initial Decision in these proceedings. It asserts that only if the payments among all the entities net out, which they claim is unlikely based on the Initial Decision, will sufficient funds be available to provide the necessary refunds to those who did not settle.

5. In addition, Quest Energy contends that the PJM Settlement would prevent the implementation of the Presiding Judge's recommendation in the Initial Decision to collect lost revenues through a uniform charge. It argues that the PJM Settlement attempts to insulate the transmission owners from providing refunds to non-settling parties by prohibiting further collection of monies necessary to pay those refunds. Thus, Quest Energy asks that the Commission clarify that the PJM Settlement cannot affect non-settling parties and that transmission owners are still liable for the full amount of any refunds owed to non-settling parties. It also asks that the Commission adopt a three step process to ensure that transmission owners are able to recover their lost revenues and that non-settling load serving entities do not overpay their respective share of these lost revenues.

6. On February 20, 2007, the PJM/Midwest ISO Settling Parties filed reply comments. They ask that the Commission strike or disregard those portions of Quest Energy's comments that relate to the merits of their litigation position in these proceedings. They also argue that Quest Energy incorrectly asserts that the PJM Settlement attempts to directly affect any remedy they could obtain as a result of a Commission order on the pending Initial Decision. They respond that the PJM Settlement resolves all litigation issues in these proceedings solely among the settling parties and has no effect on litigation issues between any of the settling parties and non-settling parties, and has no effect on other settlements. They point out that Article II defines the scope of the PJM Settlement as resolving issues among the settling parties, and issues between a settling party and a non-settling party are outside the scope of the settlement.

7. In addition, the PJM/Midwest ISO Settling Parties state that nothing in the settlement affects surcharges or refunds to non-settling parties resulting from a Commission decision or another settlement approved by the Commission, and the settlement does not affect any potential defense that any non-settling party might have to any party's claimed lost revenue responsibility or SECA obligation. They also maintain

that Section 3.7 does not exempt them from paying surcharges or receiving refunds applicable to lost revenue claims of non-settling transmission owners, nor does it affect the obligations of non-settling parties that are load serving entities to pay surcharges or receive refunds applicable to a lost revenue claim of a transmission owner, regardless of whether the transmission owner is or is not a settling party. They also ask that the Commission reject the three-step refund/billing process proposed by Quest Energy since it has no relevance to the settlement, and is outside the proper scope of comments on the settlement.

### **AEP Settlement**

8. On September 12, 2008, in Docket No. ER05-6-107, *et al.*, the AEP Settling Parties<sup>3</sup> and the Midwest ISO Settling Parties<sup>4</sup> (collectively, AEP/Midwest ISO Settling Parties) filed a Settlement Agreement (AEP Settlement).<sup>5</sup> Specifically, under Section 3.2 of the AEP Settlement each of the Midwest ISO Settling Parties that is a load serving entity accepts responsibility with respect to total monetary obligations to the AEP Settling Parties in the amounts shown as agreed SECA obligations and refund amounts (prior to netting) in the top portion of Appendix A for such Midwest ISO Settling Party. The AEP Settling Parties accept responsibility with respect to total monetary obligations

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<sup>3</sup> The AEP Settling Parties are American Electric Power Service Corporation, on behalf of itself and Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company.

<sup>4</sup> The Midwest ISO Settling Parties for purposes of this settlement are: Alliant Energy Corporate Services, Inc., on behalf of its operating company affiliates Interstate Power and Light Company and Wisconsin Power and Light Company; Ameren Services Company, as agent for Union Electric Company, Central Illinois Public Service Company, Central Illinois Light Company, and Illinois Power Company; American Transmission Company LLC; City Water, Light & Power (Springfield, IL); Duke Energy Business Services, LLC, for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; E.ON U.S. LLC, for Louisville Gas and Electric Company and Kentucky Utilities Company; Great River Energy; Indianapolis Power & Light Company; International Transmission Company; Manitoba Hydro; Michigan Electric Transmission Company, LLC; Minnesota Power and its subsidiary Superior Water, L&P; Montana-Dakota Utilities Company; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; and Wabash Valley Power Association, Inc.

<sup>5</sup> The AEP/Midwest ISO Settling Parties note that the AEP Settlement does not resolve any intra-RTO SECA claims among the Wabash Valley Power Association, Inc. and any other PJM transmission owner other than the AEP Settling Parties.

to the Midwest ISO Settling Parties in the amounts shown as agreed SECA obligation and refund amounts (prior to netting) in the bottom portion of Appendix A. The settling parties agree that these respective amounts represent a fair and complete settlement of all issues concerning the respective obligations of the AEP Settling Parties and the Midwest ISO Settling Parties to one another in these proceedings. The AEP/Midwest ISO Settling Parties further agree that the netting of these respective settlement amounts results in a net refund obligation of \$835,340 from the AEP Settling Parties to the Midwest ISO Settling Parties.

9. On October 2, 2008, Quest Energy, LLC, Integrys Energy Services, Inc., and Strategic Energy, LLC (collectively, Quest) filed a protest and comments opposing the AEP Settlement. Specifically, Quest is concerned that the settlement may affect non-settling parties, and asserts that the transmission owners would collect 91 percent of their lost revenues, which Quest argues was shown at hearing in these proceedings to be excessive. Quest also maintains that the AEP/Midwest ISO Settling Parties have drafted Sections 2.2 and 3.5 to directly affect any remedy that it would obtain as a result of a Commission order on the pending Initial Decision. It argues that Section 3.5 unmodified could result in denial of the ability of load serving entities such as Quest from obtaining a refund of a portion of lost revenues.

10. In addition, Quest asserts that the AEP Settlement insulates transmission owners from providing refunds to non-settling parties by prohibiting further collection of monies necessary to pay those refunds. It asks that the Commission clarify that the AEP Settlement cannot affect non-settling parties and that transmission owners are still liable for the full amount of any refunds owed to non-settling parties. Finally, Quest asks that the Commission adopt a three step process to ensure that transmission owners are able to recover their lost revenues and that non-settling load serving entities do not overpay their respective share of these lost revenues.

11. On October 14, 2008, the AEP/Midwest ISO Settling Parties filed reply comments. They basically repeat the same arguments made by the PJM/Midwest ISO Settling Parties in their reply comments related to the other settlement addressed in this order. The AEP/Midwest ISO Settling Parties ask that the Commission strike or disregard those portions of Quest's comments that argue the merits of SECA since they have no relevance to the settlement. They also argue that Quest incorrectly asserts that the settlement attempts to directly affect any remedy that Quest could obtain as a result of a Commission order on the pending Initial Decision in these proceedings. They argue that the settlement resolves all litigation issues in these proceedings among the settling parties and has no effect on litigation issues between any of the settling parties and non-settling parties, and it has no effect on other settlements. They point out that Article II defines the scope of the settlement as resolving issues among the settling parties, and thus issues between a settling party and a non-settling party and issues among non-settling parties are outside the scope of the settlement.

12. In response to Quest's concern that the settlement insulates transmission owners from providing refunds to non-settling parties, the AEP/Midwest ISO Settling Parties argue that nothing in the settlement affects surcharges or refunds to non-settling parties resulting from a Commission decision or another settlement approved by the Commission. They note that the settlement does not affect any potential defense that any non-settling party might have to any party's claimed lost revenue responsibility or SECA obligation. The AEP/Midwest ISO Settling Parties also clarify that Section 3.5 does not exempt them from paying surcharges or receiving refunds applicable to lost revenue claims of non-settling transmission owners, nor does Section 3.5 affect the obligations of non-settling parties that are load serving entities to pay surcharges or receive refunds applicable to a lost revenue claim of a transmission owner, regardless of whether the transmission owner is or is not a settling party. Finally, they ask that the Commission reject the three-step refund/billing process proposed by Quest since it has no relevance to the settlement and is outside the proper scope of comments on the settlement.

### **Discussion**

13. Quest Energy's and Quest's basic objection to the two settlements at issue here is that, as non-settling parties, they may be adversely affected by the two settlements at issue here. The PJM/Midwest ISO Settling Parties and the AEP/Midwest ISO Settling Parties responded with essentially the same arguments in their reply comments. They maintain that Article II, specifically Section 2.2, defines the scope of the respective settlements and protects non-settling parties from impacts resulting from these settlements.

14. We agree with the PJM/Midwest ISO Settling Parties and the AEP/Midwest ISO Settling Parties. Section 2.2 in both the PJM Settlement and the AEP Settlement states that "The Settlement Agreement does not in any manner affect the amount of lost revenue or SECA obligation that any non-settling party transmission owner may claim against any party to this proceeding, nor does it affect any potential defense any non-settling party might have to any claimed lost revenue responsibility or SECA obligation." In *Midwest Independent Transmission System Operator, Inc., et al.*,<sup>6</sup> we addressed similar arguments and found that the same provision provided sufficient protection against adverse effects on non-settling parties.<sup>7</sup> Likewise, in these proceedings, we find that Article II, specifically Section 2.2, in both the PJM Settlement and the AEP Settlement, provides sufficient protection against adverse effects on non-settling parties.

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<sup>6</sup> 120 FERC ¶ 61,009 (2007).

<sup>7</sup> *Id.* P 19 & n.8, P 24, 29.

15. In addition, we note that Quest Energy's and Quest's claims that they may be adversely affected by other provisions in the PJM Settlement and the AEP Settlement are unsubstantiated and speculative, and thus do not raise issues of material fact.<sup>8</sup> We also find that it is premature to address Quest Energy's and Quest's concerns regarding the impact of the Presiding Judge's findings in the pending Initial Decision in these proceedings. Since the Initial Decision is currently pending before the Commission, we would be prejudging our determination on the issues presented in the Initial Decision if we addressed the non-settling parties concerns here.<sup>9</sup>

16. We find that the PJM Settlement is thus uncontested and is, as well, fair and reasonable and in the public interest, and is hereby approved. Under the PJM Settlement, the standard of review for any modifications to this settlement requested by a non-party will be the most stringent standard permissible under applicable law. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

17. This order terminates Docket Nos. ER05-6-093, EL04-135-096, EL02-111-113, and EL03-212-109.

18. We find that the AEP Settlement is uncontested and is, as well, fair and reasonable and in the public interest, and is hereby approved. The Commission's approval of the AEP Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

19. This order terminates Docket Nos. ER05-6-107, EL04-135-111, EL02-111-128, and EL03-212-124.

By the Commission. Commissioners Kelly and Wellinghoff concurring in part  
with a separate joint statement attached.  
Commissioner Moeller not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>8</sup> *Id.* n.7, 10.

<sup>9</sup> *Id.* n.12.

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(Issued December 19, 2008)

KELLY and WELLINGHOFF, Commissioners, *concurring in part*:

The proposed standard of review in the PJM Settlement would have the Commission apply the “most stringent standard permissible under applicable law” to any changes proposed by non-parties or the Commission acting *sua sponte*.

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the FPA requires it to apply the presumption that the contract meets the “just and reasonable” requirement imposed by the FPA.<sup>1</sup> The contracts that are accorded this special application of the “just and reasonable” standard are those “freely negotiated wholesale-energy contracts” that were given a unique role in the FPA.<sup>2</sup> In contrast, the U.S. Court of Appeal for the District of Columbia Circuit (D.C. Circuit) determined that the proper standard of review for a different type of agreement, with regard to changes proposed by non-contracting third parties, was the “‘just and reasonable’ standard in section 206 of the Federal Power Act.”<sup>3</sup> The agreement at issue in *Maine PUC* was a multilateral settlement negotiated in a Commission adjudication of a utility’s proposal to revise its tariff substantially to enable it to establish and operate a locational installed electricity

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<sup>1</sup> *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

<sup>2</sup> *Id.*

<sup>3</sup> *Maine Pub. Utils. Comm’n*, 520 F.3d 464, 478, *petition for reh’g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (*Maine PUC*).



capacity market. The D.C. Circuit's rationale in *Maine PUC* applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*.<sup>4</sup>

Our review of the PJM Settlement indicates that it more closely resembles the *Maine PUC* adjudicatory settlement than the *Morgan Stanley* wholesale-energy sales contracts, which, for example, were freely negotiated outside the regulatory process. Therefore, the "most stringent standard permissible under applicable law" as applied here to changes proposed by non-parties or the Commission acting *sua sponte* means the "just and reasonable" standard of review. The Commission retains the right to investigate the rates, terms, and conditions of the settlement under the "just and reasonable" standard of review set forth under FPA section 206.<sup>5</sup>

For these reasons, we concur in part.

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Suede G. Kelly  
Commissioner

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Jon Wellinghoff  
Commissioner

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<sup>4</sup> See *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm'rs Wellinghoff and Kelly dissenting in part).

<sup>5</sup> 16 U.S.C. § 824(e) (2006).